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IN THE

Supreme Court Of The United States

October Term, 1995

THE VILLAGE OF AIRMONT, and its Municipal Officers,

Petitioners,

v.

RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, PARK AVENUE SYNAGOGUE, INC., and UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR RABBI YITZCHOK LEBLANC-STERNBERG, CHANIE LEBLANC-STERNBERG, FRED WALFISH, LEWIS KAMMAN, AND PARK AVENUE SYNAGOGUE, INC., RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in deciding that the Petitioner's zoning code, the object of which was to target for discrimination the home worship practices of Orthodox Jews, violated the Free Exercise of Religion and Fair Housing Act rights of the Respondents.
2. Whether the Respondents have standing to bring their case, and was such case ripe for adjudication, where the Court of Appeals found that Petitioner's zoning code would likely be applied in a discriminatory manner.

LIST OF PARTIES

The parties are accurately stated in the caption of this case. Respondent Park Avenue Synagogue, Inc., is a non-profit and non-stock corporation that has no parent or subsidiary companies.

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OPINIONS BELOW

Petitioner has accurately described the Court of Appeals decision. However, Appendix A of the Petition as filed by Petitioner is incomplete. Respondents attach the omitted page of the Court of Appeals decision as Respondents' Appendix A. The opinion of the Second Circuit Court of Appeals is also published at 67 F.3d 412 (2nd Cir. 1995).

STATEMENT OF JURISDICTION

Petitioner has accurately stated the basis for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . .

42 U.S.C. § 3604(a)

The Fair Housing Act (42 U.S.C. § 3601 *et seq.*) makes it unlawful:

> [t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of . . . religion.

42 U.S.C. § 3613(a)(1)(A) and 42 U.S.C. § 3602(j)

Under 42 U.S.C. § 3613(a)(1)(A) the Fair Housing Act confers standing to bring suit on any "aggrieved person."

An "aggrieved person" includes:

any person who –

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

STATEMENT OF THE CASE

Petitioner's statement of the case omits certain key facts which were central to the determination in Respondents' favor of the Court of Appeals for the Second Circuit.

The individual Respondents are members of Respondent Park Avenue Synagogue, which meets in the home of Respondent Rabbi Yitzchok LeBlanc-Sternberg. His home was originally situated within the corporate limits of the Town of Ramapo, New York. Subsequent to the incorporation of the Petitioner, the home became situated within the limits of the Village of Airmont.

Orthodox Judaism requires "a relatively high number of local houses of worship. Daily prayer is required, and the saying of certain prayers and the reading from the Torah on the Sabbath require the presence of a 'minyan' -- a quorum of ten males over the age of 13. Orthodox Jews are forbidden to use cars or other means of transportation during religious holidays and the weekly Sabbath; thus adherents are required to walk to their houses of worship." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 417 (2nd Cir. 1995) (Pet., 7a).

Members of a local group, the Airmont Civic Association ("ACA"), were outraged by the Town of Ramapo's use of the Home Professional Office ("HPO") provisions of the Town's zoning code to accommodate the home worship needs of the Orthodox Jewish population in residential areas. A drive was launched by the ACA and its supporters to incorporate their own village, specifically "for control over zoning in connection with the desire to keep Orthodox and Hasidic Jews out of the Airmont community." 67 F.3d 418 (Pet., 9a-10a).

The incorporation of Airmont as a Village was finalized in 1991, and a slate of officers who were ACA members was selected. These officers were opposed to home worship by Orthodox Jews. 67 F.3d 420-421 (Pet., 15a-16a). Five days later, Respondents filed the instant action alleging violation of

the Free Exercise of Religion rights of Respondents under the First Amendment, pursuant to 42 U.S.C. § 1983, and alleging violation of 42 U.S.C. § 3601 *et seq.*. Subsequently, Respondent United States filed its action under the Fair Housing Act against Petitioner. Both actions were consolidated for trial.

In 1993 Airmont enacted a zoning code, which was identical to the Ramapo code, except for changes to the HPO section. The Airmont code prohibited "any activities that come into a residential area so as to detract from the residential character of the area," and gave standing to any "aggrieved person" to request that the Board of Zoning Appeals interpret whether any disputed use was in violation of the section. 67 F.3d 420 (Pet., 14a-15a).

At trial, the jury found that Petitioner had violated the rights of these Respondents to the free exercise of their religion, under 42 U.S.C. § 1983, as well as their rights under 42 U.S.C. § 3601 *et seq.* However, in the trial of the Government action the district court found that the Village had taken no injurious action against the Orthodox citizens save only to pass the subject zoning code which the trial court found "arguably could be taken as a signal for a different interpretation" than the accommodating solution arrived at by the Town of Ramapo, but noted that it was equally likely that Airmont would avoid such an interpretation in light of the almost certain litigation that would follow. The trial court, in motions after verdict, struck down the jury's verdict on the motion of Petitioner under Fed. R. Civ. P. 50(b), incorporating its memorandum decision in the Government's case as a basis for its decision against these Respondents. 67 F.3d 423-424, 427-431 (Pet., 32a-41a).

On appeal, the Court of Appeals for the Second Circuit reversed the trial court, noting that the district court's reasoning was, *inter alia*, internally inconsistent. For example, the trial court discussed the foreseeable outcome of the Planning Board, "[v]iewing the evidence in the light most favorable to the Government," not adopting the "Ramapo inter-

pretation of the home professional office exception," 67 F.3d 430 (Pet., 13a-14a). Yet, the court itself neglected to adopt that view "in the light most favorable" to Respondents, as it was required to do in ruling on the Rule 50(b) motion of Petitioner and in assessing the jury verdict that found in Respondents' favor. 67 F.3d 429-31 (Pet., 39a).

Further, the Court of Appeals found ample support for the finding that "the Village conspired to impede the private plaintiffs' exercise of their rights under the First Amendment; that the Village adopted a zoning code that was intended to, and would be interpreted to, curtail home synagogues, thereby deterring Orthodox Jews from purchasing homes in many Airmont neighborhoods." 67 F.3d 429 (Pet., 36a).

The Court of Appeals noted with disfavor the:

> plethora of statements in the record attributed to ACA leaders who became Village officials, expressing anti-Orthodox Jewish sentiments (e.g. by Kendrick, who eventually became mayor, describing Orthodox Jews as "foreigners and interlopers," who were "ignorant and uneducated" and "an insult to" the community); Fletcher, who eventually became a trustee ("the only reason we formed this village is to keep those Jews from Williamsburg out of here."); and Cucolo as a trustee (Village did not "have to pursue an Article 78 [with respect to Rabbi Sternberg's home synagogue], there are other ways we can harass them").

67 F.3d 430 (Pet., 39a). Although no damages were awarded, Respondents and the Government also sought declaratory and injunctive relief, and the Second Circuit remanded the case back to the district court for determination of appropriate relief. 67 F.3d 435 (Appendix A-1).

It is important to note that Petitioner has *not* sought review by this Court of the Second Circuit's reversal of the trial court relating to the sufficiency of the evidence to support the

jury's findings that the Petitioner violated the First Amendment and the Fair Housing Act. Thus, this Court is bound by the evidentiary record as construed by the Second Circuit.

Rather, Petitioner seeks review on the question of whether (on the assumption that the zoning code was "facially neutral"), the Court of Appeals for the Second Circuit improperly required Petitioner to affirmatively accommodate the home worship practices of Respondents under the First Amendment and the Fair Housing Act. Secondly, Petitioner urges review on issues of standing and ripeness.We respectfully submit that the decision of the Court of Appeals for the Second Circuit decision was rightly decided and that none of Petitioner's arguments merit review by this Court.

REASONS FOR DENYING THE WRIT

I. THERE IS NO DIVISION IN THE CIRCUITS REGARDING GOVERNMENT ACTION THAT TARGETS RELIGIOUS PRACTICES FOR DISCRIMINATION

Petitioner pronounces a "deep division" among the Circuits regarding the manner of resolving conflicts between local zoning regulations and religious activities restricted or prohibited by those regulations. While it is correct that some of the federal Circuits have adopted differing standards regarding the resolution of those kinds of conflicts, whatever their differences may be, such divisions are beside the point in this case. There is no division, "deep" or otherwise, concerning the invalidity of official government action under the Free Exercise Clause of the First Amendment when that action has, *as its object*, the targeting of religious belief or practice for discriminatory treatment. The cases cited by Petitioner do not indicate otherwise.

In *Lakewood v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied* 464 U.S. 815 (1983) the subject zoning code effectively prohibited the construction of new churches

in all residential areas, and limited such new construction to ten percent of the area of the city. *Id.*, 699 F.2d 307. However, as the Court emphasized:

> [T]he record does not indicate that the Congregation may not purchase an *existing* church or worship in any building in the remaining ninety percent of the City.

Id. (emphasis added). Thus, the *effect* of the zoning code was *not* to lock-out all religious worship or any particular mode of religious practice. But even more importantly, the Court noted that there was no contention of a discriminatory animus behind the zoning provision:

> Contrary to the Congregation's arguments, this case does not present a situation similar to *Keego Harbor Company v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981). In *Keego Harbor*, a zoning ordinance effectively excluded adult movie theaters from the city by setting severe spacing limitations. This court found the ordinance unconstitutional because the purpose and effect were to eliminate from the city the exercise of a first amendment right.

Id. (emphasis added).

Thus, the law in the Sixth Circuit supports that position that when the purpose and effect of zoning is to limit or exclude activities protected by the First Amendment, the regulation must satisfy strict scrutiny (i.e. *Keego Harbor*), but where the zoning regulation has no such purpose or effect (i.e. where it is truly a "neutral law" of "general applicability," as in *Lakewood*) there is no duty to accommodate Free Exercise activities, particularly where "the activity has no religious or ritualistic significance[1] for the. . ." religious objectors. *Lakewood*, 699 F.2d 306.

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[1] In *Lakewood*, the court could find no Free Exercise significance to the Jehovah's Witnesses having to buy an existing worship structure, as

While Petitioner stresses the language in *Lakewood* that concluded that the effect of the zoning code was simply to make the plaintiff's religious practice "more expensive" (Pet., 7), a circumstance not *per se* violative of Free Exercise, Petitioner ignores the broader context of that rule which finds its source in *Braunfeld v. Brown*, 366 U.S. 599 (1961). As the Court in *Lakewood* points out:

> [T]he incidental economic burden [placed on the plaintiffs in *Braunfeld*] was not unconstitutional because neither the *purpose* nor the *effect* of the law was to impede religious observation or to discriminate among religions.

699 F.2d 306 (emphasis added). In the instant case the Village of Airmont was incorporated for the express purpose of passing zoning restrictions, the *purpose* and *effect* of which was to discriminate against Orthodox Jewish practices. The enormous and impractical cost of building a free-standing synagogue on two acres of land was not an *incidental* financial effect on Respondents because of Airmont's "neutral" and "generally applicable" zoning code; on the contrary, the enormous cost was the very tool used by the Village founders to *intentionally* discourage a disfavored religious group from moving in.

When a municipality purposefully plans to impose financial burdens on a disfavored religious practice as a means of discriminating against it, the Free Exercise Clause protects that religious practice, and will sustain the offending law

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opposed to their desire to construct a new structure in a zoning area on which such construction was now prohibited. In the instant case, however, "[t]he combination of [their religious] requirements makes it important for Orthodox Jews to be able to gather for worship in congregations large enough to ensure the presence of a minyan, and close enough to the congregant's homes to allow them to walk to services." *LeBlanc-Sternberg*, at 67 F.3d 417 (Pet. 7a-8a).

"only in rare cases." *LeBlanc-Sternberg*, 67 F.3d 426, quoting from *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. ___, 113 S.Ct. 2217, 2233 (1992). "[A] law targeting religious beliefs as such is never permissible." *Id.*, 113 S.Ct. at 2227.

The facts in *Lakewood* did not include the intentional targeting of religion, as is the situation in the instant case, and nothing in *Lakewood* is inconsistent with the reasoning of this Court in *Lukumi Babalu* some ten years later.

Similarly, Petitioner's citation to *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984) (Pet., 7), is of no avail in establishing a "division" among the circuits relevant to this case.

Petitioners contention that *Grosz* contains "nearly identical facts" (Pet., 7) is simply incorrect. As was the case in *Lakewood*, the *Grosz* facts did not involve a situation where a municipality intentionally targeted a religious practice for discrimination through its zoning code. Indeed, in *Grosz*, the court stated: "No one contends that zoning laws are based upon disagreement with religious tenets, or are aimed at impeding religion." 721 F.2d 738.

In the instant case, however, the Second Circuit specifically found that Petitioner passed its zoning code as an effort aimed at impeding the religious practices of Orthodox Jews. Further, the *Grosz* case was decided almost a decade before *Lukumi Babalu* and, therefore, any perceived division arising from the *Grosz* decision (or the *Lakewood* decision for that matter) is of dubious value as a basis for this Court to grant certiorari.

While the reasoning in *Grosz* still has influence in the Eleventh Circuit, that Circuit has itself distinguished *Grosz* from the *Lukumi Babalu* paradigm on the basis that the *Lukumi Babalu* case involved "a local law targeting" religious practice for discrimination. *First Assembly of God v. Collier County, Fla.*, 20 F.3d 419, 423 (11th Cir. 1994).

In *First Assembly of God*, the plaintiffs argued that the *Grosz* reasoning was no longer valid law because the *Grosz* reasoning was the basis of the trial court's decision in *Lukumi Babalu*, reasoning which was rejected by this Court. The Eleventh Circuit has concluded that, "[t]he Supreme Court reversed the application of *Grosz*, not the holding of *Grosz* itself or the reasoning behind it." *Id.*, 423 n.4.

Respondents' respectfully submit that, whatever problems there may be with the reasoning used in *Grosz*,[2] that reasoning is simply not applicable to a case of intentional discrimination, as is the case at bar.

Petitioner's reliance on *Islamic Center of Mississippi, Inc. v. City of Starkville, Miss.*, 840 F.2d 293 (5th Cir. 1988) is misplaced, since *Islamic Center* handily distinguishes both *Lakewood* and *Grosz* from the facts in that case.

First, the Court in *Islamic Center* emphasized that in *Lakewood* the evidence showed that the congregation in question could have purchased an existing church within ninety percent of the city's area, or alternatively, could have performed its worship practices in a non-church building

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[2] One of the lesser, but more obvious problems in the *Grosz* decision, is its curious reliance on a statement by Supreme Court Justice Vinson in a majority opinion of *American Communications Assn. v. Douds*, 339 U.S. 382, 397 (1950) (cited by the *Grosz* court at 721 F.2d 740.) In fact, Justice Vinson's comments in *Douds* are clearly *obiter dicta*. His comments inferred a basis for the Supreme Court's dismissal, for want of substantiality, of an appeal, in *Corporation of Presiding Bishop, C.J.C.L.D.S.S. v. Porterville*, 338 U.S. 805 (1949), in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance which prevented the building of churches and residential areas.

A further defect is *Grosz*'s reliance on *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), a case where this Court construed the constitutionality of generalized and comprehensive zoning power within the framework of a Due Process analysis. A First Amendment analysis of zoning power, which is required in the instant case, was not adjudicated in *Euclid*.

within that ninety percent area. *Islamic Center*, 840 F.2d 301. As the court pointed out, "travel to worship," which was a factor for the Islamic students in the *Islamic Center* case, was simply not a factor in *Lakewood. Id.* In the instant case, as in *Islamic Center*, special considerations relating to travel to a worship site are integral to the exercise of faith for the Orthodox Respondents.

The Court in *Islamic Center* also easily distinguished the facts in *Grosz*, where the court noted that the plaintiff could have conducted services within four blocks of his home, or had the option of relocating his home to another residential area of the city where home-worship was permitted (an area comprising some fifty percent of the city). 840 F.2d 301.In the instant case, nearly all of Airmont is residential, and all of the residential areas are subject to a zoning code making group worship in a home a non-permitted use unless located in a suitable structure on a two-acre lot. That restriction, coupled with the unique needs of the Orthodox community to be within walking distance of a Sabbath worship site, emphasize the similarity of the instant facts to those in *Islamic Center*, facts which are clearly dissimilar to those in *Lakewood* and *Grosz*.

The court in *Islamic Center* further distinguished the facts in that case from the facts decided in the Eleventh Circuit and Sixth Circuit Cases by pointing out the evidence of a discriminatory motive in the *Islamic Center* record. The court noted that the zoning board had "applied different standards to approving a Muslim mosque than it had adopted for worship facilities of other faiths." *Id.*, 303. Similarly, in the instant case the record shows that the ACA, the prime mover behind Airmont's incorporation and the push for its own zoning code, opposed even a slight variance for an Orthodox Jewish synagogue, yet did not oppose a major variance for a Catholic church structure "because this is the Catholic church that wants it." *LeBlanc-Sternberg*, 67 F.3d 431 (Pet., 41a).

Lastly, even assuming *arguendo* a division in the Eleventh, Sixth, Fifth and Second Circuits, there is another reason why such a division would be ultimately illusory. The decisions in *Lakewood*, *Grosz* and *Islamic Center* all pre-date this Court's decisions in *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Lukumi Babalu*, as well as Congressional passage of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000 bb (restoring the "compelling interest" and "least restrictive means" tests in light of *Employment Division v. Smith*). How the Eleventh or Sixth Circuits would decide cases whose facts implicate *Smith*, *Lukumi Babalu*, or RFRA is unknown, and undermines the argument made by Petitioner.

II. THE SECOND CIRCUIT'S OPINION PROPERLY APPLIED *CHURCH OF THE LUKUMI BABALU AYE, INC. V. CITY OF HIALEAH*

Petitioner is incorrect in asserting that in the instant case the Second Circuit opinion "mandates some type of accommodation by the municipality" toward the religious practices of the Respondents. Pet., 9. While we do agree that, if the facts in this case had *not* shown intentional discrimination by the Village of Airmont, that nevertheless the Free Exercise Clause would require some level of accommodation to the religious practices of the Respondents, those were not the facts in this case, and that was not the decision rendered by the Second Circuit. Rather, the Second Circuit decided that the Village of Airmont had intentionally discriminated against the religious practices of the Respondents through its zoning code, in violation of the First Amendment.

Indeed, the Second Circuit specifically declined to decide the "accommodation" issue while noting that "it is unclear to what extent this prohibition [of the Free Exercise Clause] requires states affirmatively to accommodate religious practice" (citing *Lukumi Babalu*). *LeBlanc-Sternberg*, 67 F.3d 426 (Pet., 29a). Petitioner is also incorrect in asserting that the Second Circuit decision in this case "is a total

embrace of the four-justice dissenting opinion in *Smith*, as well as the concurring opinion by Justice Souter in *Lukumi Babalu Aye*." Pet., 10.

Whatever reasons may exist for revisiting the rule in *Smith* (*Lukumi Babalu*, 508 U.S. ___, 113 S.Ct. 2217, 2240 (Souter, J., concurring in part, and concurring in the Judgment), 2250 (Blackmun, J., with whom O'Connor, J., joins, concurring in Judgment)), they should not include the mistaken belief that the Second Circuit in the instant case rejected the majority rule in *Smith*. In the instant case, the Second Circuit adopted the *Lukumi Babalu* analytical paradigm because this case, like *Lukumi Babalu*, involved intentional targeting of a religious practice by a local municipality. *Lukumi Babalu* did not overturn *Smith*.[3]

To a great degree, Petitioner's error lies in the insistence that "neutrality" and "general applicability," as those terms arise under *Smith*, and as further construed in *Lukumi Babalu*, are limited only to laws that are "*facially* neutral." Thus, because Petitioner denominates its zoning ordinance as "*facially* neutral" (Pet., 4) (emphasis added), Petitioner mistakenly assumes that the neutrality analysis ends there.

In fact, *Lukumi Babalu* specifically rejected the contention that this Court's "inquiry [with respect to neutrality under the Free Exercise Clause] must end with the text of the laws at issue," adding that:

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[3] Admittedly, in *Lukumi Babalu*, Justice Souter, concurring in the Judgement, had "doubts about whether the *Smith* rule merits adherence," (113 S.Ct. at 2240) and Justice Blackmun and Justice O'Connor, while concurring in the Judgement, expressed their position that they "continue to believe that *Smith* was wrongly decided because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an anti-discrimination principal," (113 S.Ct. at 2250) (citations omitted).

> Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination.

113 S.Ct. at 2227. Rather, the ultimate test is whether "the object of the ordinances" is the "suppression . . . of the central element of [Respondents'] worship service." *Id.*

Finally, Justice Souter's concurrence in *Lukumi Babalu* conceded that:

> The proposition for which the *Smith* rule stands, then, is that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause. That proposition *is not at issue in this case*, however, for Hialeah's animal-sacrifice ordinances are not neutral under any definition, any more than they are generally applicable.

113 S.Ct. at 2242 (emphasis added).

If Hialeah's animal sacrifice laws were not neutral under "any definition," then likewise, the zoning ordinances of the Village of Airmont in this case are not "neutral" or "generally applicable" under any definition. Thus, revisiting the use of those terms in the *Smith* case is not compelled by the Second Circuit's opinion in this case.

III. THIS ACTION DOES NOT VIOLATE RULES REGARDING STANDING OR RIPENESS

Petitioner contends that this Court should review Respondents' lack of standing to have brought this case in the first instance, arguing that Respondents did not suffer any injury and failed to identify any future harm that possessed "imminence or immediacy," Pet., 10-11.

At a minimum, the Constitution requires plaintiffs to show they have suffered "some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for the*

Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). The injury must be traceable to the challenged action and be "likely to be redressed by a favorable decision." *Id.*; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). The injury must result from an invasion of a legally protected interest which is (1) concrete or particularized and (2) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Within the foregoing analysis of standing, Petitioner argues that because Respondents did not suffer any past "actual" injury (as Respondents had already obtained permission from the Town of Ramapo to conduct their home worship services, prior to the Airmont incorporation), the only remaining issue was whether or not Respondents showed a sufficient "imminent" threatened injury that was not conjectural or hypothetical.

The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indirect damage to the use of one's land, which is the subject of governmental action, is sufficient to confer standing. *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

Airmont's incorporation, and the changes to the HPO provisions of its zoning codes, clearly presented the Respondents with a situation where Rabbi Sternberg's home was a non-conforming use for purposes of home synagogue worship. Pet., 14 n.2. This, coupled with the reality that the Village of Airmont (not the Town of Ramapo) would be the government entity enforcing and policing the Respondents' use of the Sternberg home for worship purposes, show a likelihood of imminent harm to the Respondents imposed by Airmont's incorporation and the passage of its zoning law.

Respondents have contended that the legal paradigm for the First Amendment issues in this case lies within the pa-

rameters of the decision in *Lukumi Babalu, supra*. It is important to note that the plaintiff church in that case filed an action under 42 U.S.C. § 1983, "[f]ollowing enactment of [the] ordinances. . . ," with no hint that the City of Hialeah had sought to specifically enforce its ordinances against the plaintiff church. *Id.*, 113 S.Ct. at 2224.

In the instant case, the Second Circuit determined that ". . .there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues, that the motivation behind the enactment was discriminatory against Orthodox and Hasidic Jews, and that Airmont pursued this goal jointly with A.C.A." 67 F.3d 431 (Pet., 41a). As the Second Circuit pointed out, "the victim of a conspiracy to violate First Amendment freedoms has standing to bring suit before the conspiracy has resulted in economic or tangible injury." 67 F.3d 426 (Pet., 30a), citing *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 393 (1988) (facial First Amendment challenge to a state law limiting the display of sexually explicit material, which was brought prior to the law's enforcement, was determined not to be premature).

Because Petitioner in the instant case does not challenge the Second Circuit's evaluation of the sufficiency of the evidence to support the jury verdict, we would submit that the Second Circuit's conclusions as to the probable harm that would be caused to Respondents by Petitioner's zoning code must be upheld. That being the case, Respondents have more than adequately demonstrated a concrete and imminent injury to their First Amendment rights sufficient to satisfy the requirements of standing under Article III of the U.S. Constitution.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) does not compel a different conclusion. In *Lujan*, wildlife and environmental organizations filed suit challenging an agency rule limiting a section of the Endangered Species Act of 1973 geographically to the borders of the United States and the

high seas, but excluding coverage to any actions having a wildlife impact in foreign nations. This Court found a lack of standing because, *inter alia*, standing is difficult, if not impossible to show where third parties, rather than the complaining environmental and wildlife organizations themselves, were the object of the governmental decision which was being objected to.

The organizations had filed affidavits claiming that some of their members intended to revisit sites that would be affected by the agency decision at some indefinite, future time. This Court rightly determined that a vague intent to take some action that might expose the complaining party to offending government action at some indefinite, future time, does not constitute an "imminent" injury for standing purposes.

By contrast, in the instant case, the palpable and concrete injury that is imminent as to Respondents lies in the announced intention of Petitioner to prohibit home synagogue worship through its strict zoning code and its strict zoning interpretation. The imminence of the injury lies not in the vague intentions of the complaining parties (as was the case in *Lujan*), but entirely within the declared intentions of Petitioner to discriminate against the religious practices of Respondents.

Petitioner also cites a lack of ripeness as a basis for this Court to grant certiorari. However, Petitioner's citation to *U.S. v. Village of Palatine, Ill.*, 37 F.3d 1230 (7th Cir. 1994) must lead us to the conclusion that they are "hoist on their own petard." Indeed, Petitioner's own argument cites the following determinative reasoning of the Seventh Circuit:

> [I]f the Plaintiff's claim were of discriminatory intent, rather than failure to make a reasonable accommodation, this claim *might well be* presently ripe even though Oxford House-Mallard has not sought a special use approval.

Pet., 19-20 n.4; 37 F.3d 1233 n.3."

Thus, where it has been established that a zoning ordinance will likely be applied in a discriminatory manner, it is unnecessary that the municipality so apply it before the ordinance may properly be challenged." (*LeBlanc-Sternberg*, 67 F.3d 425 (Pet., 26a), citing *Parkview Heights Corp. v. City of Blackjack*, 467 F.2d 1208, 1214-16 (8th Cir. 1972).)

The doctrine of ripeness is a prudential doctrine of this Court, taking into consideration the fitness of the issues for judicial decision-making, and the hardship to the complaining party of withholding judicial consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Where, as here, there is powerful and established evidence of Petitioner's plan and governmental action to discriminate against Respondents' Free Exercise rights, and where Petitioner has passed a zoning ordinance to implement that discriminatory intent, it would be both imprudent and futile to require Respondents to wait until Petitioner actually brings enforcement proceedings against their home synagogue activity as a precondition to filing suit.

The threat and the injury to Respondents has been proven to a probability (and not a mere possibility), and that, coupled with the proven discriminatory intent of Petitioner should resolve any standing or ripeness concerns. *Village of Arlington Heights v. Metropolitan Housing Development Co.*, 429 US. 252 (1977). (Minority plaintiff had standing to challenge exclusionary zoning scheme, where plaintiff would "probably" have moved into the housing project if it were built.)

Respondents respectfully submit that this Court need not, and should not, venture into uncharted and unnecessary construction of the Fair Housing Act's definition of an "aggrieved" person, merely because it may provide guidance to future litigants (See Pet., 11).

Ironically, if this Court were to accept the invitation of Petitioner to launch into such unnecessary construction of a Congressional enactment, that act of judicial review would,

itself, be inconsistent with the very purposes behind the standing requirements of Article III and the ripeness doctrine, both of which serve to limit adjudication to actual, and not abstract, legal controversies.

CONCLUSION

Respondents respectfully submit that Petitioner has not only failed to identify any important question of federal law for this Court to review or any "deep division" among the Circuits, but has also failed to demonstrate any reason why the decision of the Second Circuit Court of Appeals regarding the discriminatory nature of Petitioner's conduct should not be upheld. We request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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On Remand, the district court should, applying Fair Housing Act principles, fashion appropriate equitable remedies.

CONCLUSION

We have considered all of the parties' arguments in support of their respective positions on these appeals and, except to the extent indicated above, have found them to be without merit. For the reasons stated above, we conclude that the district court erred in granting the Village of Airmont judgment as a matter of law dismissing the private plaintiffs' FHA and civil rights claims; that the jury's verdict with respect to these claims was dispositive with regard to the issue of the Village's liability in the government's suit under the FHA; and that the private plaintiffs and the government were entitled to relief.

We reverse so much of judgment entered in the private plaintiff's action, appealed in Nos. 94-7103 and -6125, as dismissed the private plaintiffs' claims against the Village; we affirm so much of that judgment as dismissed the private plaintiffs' claims against the individual defendants; and we dismiss the cross-appeal as moot. The private plaintiffs' action is remanded for the entry of judgment awarding those plaintiffs nominal damages and such injunctive and other relief as may be appropriate.